Chua Choong Yin v Tan Boon Bak Trading Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–83 OF 1991
NIK HASHIM J
30 APRIL 1999

Labour Law *— Industrial Court — Award — No specific finding of guilt on each charge leading to dismissal — Whether omission was a mere technicality which did not render award erroneous in law — Chairman agrees with submission and makes own finding — Adoption of counsel's submission in award — Whether proper*

The applicant was employed by the respondent company ('the respondent') as a credit control officer. He was dismissed after a panel of inquiry found him guilty of several instances of misconduct. The learned chairman of the Industrial Court found that the dismissal was with just cause and excuse and therefore dismissed his claim. The applicant applied for an order of certiorari to quash the decision of the Industrial Court. Counsel for the applicant also complained that the learned chairman had adopted large chunks of the respondent company's written submission as her own for her award, rendering the award highly improper, wrong in law, unjustified and should be quashed.

Held, dismissing the application:

(1) The learned chairman had made findings of fact based on the credibility of witnesses whom she had seen and heard. Although she did not make a specific finding of guilt on each charge, the omission was only a mere technicality which did not render the award erroneous in law (see p 302G–302A). On the substantial merit of the case, the Industrial Court was right in its award, as the evidence before her was more than enough to support her conclusion (see p 303A).

(2) The adoption of a counsel's submission in the decision was not improper or wrong in law if the chairman agrees with the submission and makes her own finding on it after consideration of the totality of the evidence and the surrounding circumstances of the case (see pp 303I–304A); *Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama* [1997] 3 MLJ 805 distinguished.

[Bahasa Malaysia summary

Pemohon adalah digaji oleh syarikat ('responden tersebut') sebagai pegawai kawalan kredit. Beliau telah dipecat setelah suatu panel siasatan memutuskan beliau bersalah atas beberapa kejadian-kejadian salah laku. Pengerusi yang arif Mahkamah Perindustrian memutuskan

bahawa pemecatan tersebut adalah dengan sebab dan alasan adil dan maka menolak tuntuan beliau. Pemohon tersebut memohon untuk suatu perintah certiorari untuk membatalkan keputusan mahkamah Perindustrian. Peguam pemohon juga mengadu bahawa pengerusi yang arif telah menerima-pakai sebahagian besar hujahan bertulis syarikat sebagai kepunyaan beliau untuk award beliau, menyebabkan award tersebut sangat tak wajar, salah di sisi undang-undang, tiada justifikasi dan seharusnya dibatalkan.

Diputuskan, menolak permohonan tersebut:

(1) Pengerusi yang arif telah membuat penemuan-penemuan fakta berdasarkan kebolehpercayaan saksi-saksi yang mana beliau telah lihat dan dengar. Walaupun beliau tidak membuat pendapat bersalah yang spesifik ke atas setiap tuduhan, peninggalan tersebut hanya suatu alasan-alasan teknikal semata-mata yang mana tidak menyebabkan award tersebut salah di bawah undang-undang (lihat ms 302G–303A). Di atas merit penting kes tersebut, Mahkamah Perindustrian adalah betul di dalam awardnya, kerana keterangan di hadapan beliau adalah lebih daripada mencukupi untuk menyokong kesimpulan beliau (lihat ms 303A).

(2) Penerimaan-pakai hujahan peguam di dalam keputusan tersebut bukannya tidak wajar atau salah di sisi undang-undang jika pengerusi bersetuju dengan hujahan tersebut dan membuat penemuan beliau sendiri di atasnya setelah mempertimbangkan keseluruhan keterangan dan keadaan-keadaan sekeliling kes tersebut (lihat ms 303I–304A); *Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama* [1997] 3 MLJ 805 dibeza.]

Notes

For cases on the award of the Industrial Court generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 919–934.

Cases referred to

Campbell Cheong Chan (M) Sdn Bhd v Ayyawoo Nadeson [1998] 7 MLJ 10 (refd)

Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama [1997] 3 MLJ 805 (distd)

Ter Ah Chai v The Times Packaging Co Sdn Bhd & Anor [1998] 4 CLJ 923 (refd)

Tony Dhana (*Tony Dhana*) for the applicant.

TJ Su (*S Siva* and *PY Au Yong* with him) (*Cheah Teh & Su*) for the respondent.

Cur Adv Vult

Nik Hashim J:

Application

This is an application for an order of certiorari to quash the decision of the Industrial Court Award No 291 of 1990 dated 31 October 1990 which upheld the applicant's dismissal from the service of the respondent company. The application was heard by me on 9 April 1999. After hearing both parties, I dismissed the application with costs. I now give my reasons for so doing.

Request for adjournment

At the outset of the hearing on 9 April 1999, Mr Tony Dhana, learned counsel for the applicant, applied the case to be adjourned to another date on the ground that Mr P Kuppusamy was hospitalised. I rejected the application and ordered the hearing to proceed simply because Mr P Kuppusamy was never on record as the counsel who handled the case. Furthermore, 9 April 1999 was set down as the last date for hearing and Mr Tony Dhana, who had handled the case since 1990, very well knew about this fact. This court prior to this date had already granted several postponements to the applicant at the request of Mr Tony Dhana. Thus, I found the application for another adjournment to be void of any merit whatsoever. Hence, the rejection.

Background of case

The facts of the case as stated in the award are not in dispute.

The applicant was employed by the respondent company as a credit control officer in the sales department vide offer letter of employment dated 8 January 1986. He was put on probation for three months and later the probationary period was extended for another three months. His last drawn salary at the time of dismissal was RM1,015. He was also paid a transport allowance of RM35 per month.

The applicant's main duties as a credit control officer were to obtain settlement of customers accounts within the terms laid down by the company; to endeavour to keep overall debtor duration below budget/target set by the Managing Director; to initiate legal action where necessary and to follow through to its conclusion; study credit applications, balance sheets and company reports; discuss with those responsible for credit control in other organizations; and recommend whether and at what level credit should be extended.

The applicant was dismissed by the respondent company by way of a letter of dismissal dated 4 June 1987 after a panel of inquiry found him guilty of the following charges:

(1) did not follow proper credit control procedures and instructions of No 4

and 6 of the credit control procedure/instructions letter given to you; A

(2) instructing CS Tang & Co (Advocates and Solicitors) to close file of Syarikat Perniagaan Hup Soon when their debt amounting to RM5,802.96 is not fully settled yet;

(3) make a mileage claim of 36 km based on car rate of RM0.415 per mile instead of the motorcycle rate of RM0.20 per mile. B

Industrial Court's award

After scrutinizing the evidence before her respecting the charges, the learned chairman of the Industrial Court came to a decision at p 429 of record: C

> For all the reasons stated and after careful consideration of the totality of the evidence and the surrounding circumstances as well as the submissions of both learned counsel, the court finds that the dismissal of the claimant (applicant) is with just cause and excuse. Therefore, his claim is hereby dismissed.

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Applicant's contentions

It was the submission of counsel for the applicant that the decision of the Industrial Court was perverse in that the evidence before the court did not support the charges. On the contrary, it exculpated the applicant of the charges. Counsel also argued that the alleged offences did not merit E dismissal as there was no loss to the company.

Respondent company's contention

Learned counsel for the respondent company, Mr TJ Su, submitted that the Industrial Court's award was based on findings of fact. According to him, F there was ample evidence to support the award and as such, the award was not unreasonable and he urged the court to dismiss the application.

The court's finding

With respect, I agreed with the respondent company's submission. There G was no merit in the application.

The learned chairman of the Industrial Court had made findings of fact based on the credibility of witnesses whom she had seen and heard. She had analyzed and investigated all the facts respecting the three charges and had come to the conclusion which in my view was correct. Her reasons for the H conclusion ran over nine pages of the award from pp 421–429 of the record. A further perusal of Annexure A to the respondent's written submission would show clearly that the learned chairman had acted according to the facts and evidence before her in coming to her conclusion. She was aware of her duty when she said at p 420:

I

> ... it now becomes my duty to examine the evidence before this court and come to a proper conclusion as to whether the claimant (applicant) was in fact guilty of the charges preferred against him.

A It is true that she did not make a specific finding of guilt on each charge, but the omission, to my mind, was a mere technicality which did not render the award erroneous in law (see *Campbell Cheong Chan (M) Sdn Bhd v Ayyawoo Nadeson* [1998] 7 MLJ 10). On the substantial merit of the case, the Industrial Court was right in its award, as the evidence before her was more than enough to support her conclusion (see *Ter Ah Chai v The Times* B *Packaging Co Sdn Bhd & Anor* [1998] 4 CLJ 923).

With regard to the punishment, I was of the view that the employee's misconduct justified the dismissal. In this case, the applicant had failed to carry out his duty as a credit control officer to the satisfaction of the respondent and in this respect, he had been warned twice about his C performance. The Industrial Court had heard the evidence from both parties and it came to a decision that the dismissal of the applicant was with just cause and excuse. In my view, the decision was justified and correct in law. Any reasonable chairman similarly circumstanced would have reached the same decision. I agreed with Mr TJ Su that in fact the commission of any one of the aforesaid three offences would justify the dismissal, even D although there was no loss to the company.

Adoption of respondent's submission in Industrial Court's award. Is it proper?

This issue was raised by the applicant as one of the grounds for the E application. Learned counsel for the applicant complained that the learned Chairman of the Industrial Court had adopted large chunks of the respondent company's written submission as her own for her award rendering the award highly improper, wrong in law, unjustified and should be quashed. Counsel quoted *Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama* [1997] 3 MLJ 805 in support.

F In *Far East*, the judge allowed the respondent's application for the appointment of a provisional liquidator to manage the affairs of the applicant. As a result of the applicant's appeal, the judge directed the respondent's counsel to prepare a draft judgment on the order he granted. The judge issued his written judgment, this being in substance a G reproduction of the draft judgment prepared by the respondent's counsel. The Court of Appeal held that the learned judge's conduct in inviting counsel for the respondent to prepare the draft judgment which the learned judge subsequently adopted as his own, to be highly improper and that there is no justification for such a request to have been made in the first place.

Far East and this case are poles apart and distinguishable on facts. In H that case, the learned judge had adopted relevant parts of the draft judgment of a successful party as his own judgment. Moreover, the judge there had invited counsel for the successful party to prepare the draft judgment which he subsequently adopted as his own. In the instant case, it concerns submissions and not a draft judgment. Both written submissions were before the learned chairman and she considered both of them before I she came to the decision. In my judgment, the adoption of a counsel's submission in the decision is not improper or wrong in law if the chairman agrees with the submission and makes her own finding on it. In the present

case, she agreed with the respondent's written submission and adopted it in the award. Besides, she made her own decision by making a finding after consideration of the totality of the evidence and the surrounding circumstances of the case that the dismissal was justified. Thus, the chairman's conduct in adopting the respondent's written submission could not be considered as improper or wrong in law and therefore, this ground must fail.

It is pertinent to be reminded, lest we forget, that judicial review is not an appeal from a decision but a review of the manner in which the decision was made. In this case, there was no fault in the decision-making process of the Industrial Court. There was ample evidence to support the decision. Any reasonable chairman similarly circumstanced would have reached the same decision. To my mind, the dismissal was justified.

Accordingly, the application for an order of certiorari was dismissed with costs.

Application for order of certiorari dismissed with costs.

Reported by Loo Lai Mee